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No. 1097

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN J. TORELLO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

The petitioner, John J. Torello, prays that a Writ of Certiorari issue to review the decision of the Appellate Court of Illinois, First District, which decision affirms in part, and reverses in part, the conviction of this petitioner in the cause entitled *People of the State of Illinois,* Plaintiff-Appellee, vs. *John J. Torello,* Defendant-Appellant, Numbered 52850 of that Court.

OPINION OF THE COURT BELOW

The opinion of the Illinois Appellate Court, First District, entered April 21, 1969, is reported at 248 N.E. 2d 725, and is reprinted herein in the printed appendix and in the record filed simultaneously herewith, and certified by the Clerk of the Appellate Court of Illinois, First District, First Division.

The Petition for Rehearing was denied on May 19, 1969, and the Order denying said Petition is set forth in the certified copy of the record.

The Supreme Court of Illinois denied a Petition for Leave to Appeal without opinion on October 21, 1969. The Order denying said Petition for Leave to Appeal is set forth in the certified copy of the record from the Supreme Court of Illinois filed simultaneously herewith.

STATEMENT OF JURISDICTION

The order of the Illinois Appellate Court, First District, was entered on April 21, 1969, affirming, in part, the judgment of the Circuit Court of Cook County, Illinois. On the 19th day of May, 1969, it was ordered by that Court that the Petition for Rehearing be denied.

A Petition for Leave to Appeal in the Supreme Court of Illinois was denied on October 21, 1969. This Petition for Writ of Certiorari is filed within ninety (90) days from said October 21, 1969.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Does the prohibition of the use of a prior statement for purposes of impeachment violate due process of law?

2. When a person has been convicted of both a felony and a misdemeanor on the basis of one single act, does not equal protection of the law and the policy of lenity require that only the lesser conviction stand?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chapter 38, Section 16-1(a), *Illinois Revised Statutes*

§ 16—1. Theft

> "A person commits theft when he knowingly:
> "(a) Obtains or exerts unauthorized control over property of the owner; or
>
> * * *

"Penalty.

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years.

As amended 1967, July 20, Laws 1967, p. 1802, § 1."

Chapter 38, Section 21-2, Illinois Revised Statutes.

§ 21-2. Criminal Trespass to Vehicles

"Whoever knowingly and without authority enters any vehicle, aircraft or watercraft or any part thereof of another without his consent shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 21-2."

STATEMENT OF THE CASE

On May 7, 1966, the petitioner herein was charged by indictment, together with Joseph D'Argento and Michael La Joy with the offense of theft in that they "knowingly obtained unauthorized control over an automobile, the value of more than $150.00, the property of Thomas Vana, intending to deprive said Thomas Vana permanently of the use and benefit of said property. . . ." This first count states it is in violation of Chapter 38, Section 16, (a) of the Illinois Revised Statutes.[1]

[1] There is no such section of the Illinois Revised Statutes. A motion to dismiss the Count was denied. The State was allowed to amend the indictment, under the provisions of Chapter 38, Section 111-5 as a formal defect, so the Section might read "16-1(a)."

A second count charged this petitioner, together with the same two, with the offense of criminal trespass to the same vehicle in violation of Chapter 38, Section 21-2 of the Illinois Revised Statutes. (Abs. 2-3)

A co-defendant, Joseph D'Argento, pleaded guilty on June 29, 1966 (Abs. 85). This petitioner was tried with La Joy.

The first trial of the cause resulted in a mistrial on August 18, 1967. Another jury was immediately impaneled and the trial was had before the Honorable Charles R. Barrett, Judge of the Circuit Court of Cook County, beginning August 19, and continuing through August 25, 1967, (Abst. 8-90) on which date a verdict of guilty was returned (Abs. 104), upon which verdict judgment entered (Abs. 104), upon which verdict judgment entered (Abs. 105). Motions for verdict of not guilty at the close of the state's case (Abs. 85) and at the close of all evidence (Abs. 90) were denied, and motion for new trial and in arrest of judgment (Abs. 3-6) were likewise denied and this petitioner was sentenced to a term of not less than two nor more than five years in the State Penitentiary on each count (Abs. 6-7, 105), on October 13, 1967.

Criminal trespass to a vehicle under Illinois law (Chapter 38, Section 21-2 Ill. Rev. Stat.) authorizes a sentence not to exceed one year in a non-penitentiary institution. On appeal, the Court recognized that sentence on the Second Count was in excess of that authorized by law and concluded:

> "In our opinion, defendant's convictions for 'theft' and for 'criminal trespass to vehicle' are based upon a single act, and only one sentence should have been imposed and that sentence should have been for the greater offense, in this case the offense of 'theft.' (*People* v. *Duszkewycz*, 27 Ill.2d 257, 261, 189 N.E.2d 299 (1963).) Therefore, the sentence imposed on the charge of 'criminal trespass to vehicle' should be set aside."

The evidence upon which the conviction rests is as follows:

At some time between 8:30 and 9:00 P.M. on May 2, 1965, Thomas Vana's 1964 Galaxy 500, license number DJ 1409 disappeared from the 200 block on 18th Street in Melrose Park (Abs. 21). At 9:45 he made out an auto theft report (Abs. 22).

At about 9:30 or 9:45 P.M. Leroy Jones saw a dark automobile (he did not observe either make nor model) parked on the southeast corner of Roy and Harold in Northlake. After passing the car three times, and noting first two, then three persons therein, he proceeded on his way to the Police Station, on Wolf Road and North Avenue, when he met Officer Norm Nissen (Abs. 23-27). This was about 10:00 P.M. After Jones spoke to Officer Nissen, Nissen proceeded by a circuitous route toward the corner of Roy and Harold in his marked squad car. As he proceeded up Roy, at about 25 to 30 feet south of Harold he observed a dark colored two door Ford. As he pulled up behind the car, a man looked out of the back window, and the car pulled away (Abs. 27-28, 41).

Nissen pursued the car, his red light flashing, he noticed there were three people in the car. He called the Northlake police station on the car radio, reported and was advised he was pursuing a stolen car (Abs. 28).

He continued his pursuit at speeds between 50 to 80 M.P.H. The Ford was proceeding at such high rates of speed, it twice went off the road into people's front yards and hit garbage cans sitting on the side of the road. The Ford continued to Melrose Park on 35th Street disregarding about 10 stop signs and one stop light, and turned from 35th into Lake going east (Abs. 28-29, 33).

As Nissen followed onto Lake, he observed a marked Melrose Park Radar Wagon about three blocks away coming toward him; its top red light flashing. He advised the driver of the Wagon, Joseph McKenzie, of his mission (Abs. 29). This was about 11:15 P.M. (Abs. 57).

The Ford attempted a left turn into 33rd Street, but went out of control, spun and slid into the curb, striking a sign post and jamming the door on the passenger side. Nissen got from his vehicle about 40 feet from the Ford, but he didn't stop his car, and it continued on into a gas station, knocking Nissen to the ground. As he got to his feet, the Wagon pulled up and about the same time, he saw the man on the passenger side of the Ford, Joseph D'Argento, had a gun (Abs. 29, 46, 57).

A movement in the Ford, suggested to Nissen the car was about to take off again, and he started shooting at the driver's side of the car, hitting the driver. D'Argento never fired the gun. Nissen approached the car from the driver's side, opened the front door and the driver, this petitioner, Torello, slid to the street. Officer McKenzie approached the car from the passenger side, and proceeded to pull D'Argento through the front seat window of the car. As he was being pulled, he dropped or threw the weapon in his hand into the back seat (Abs. 30, 42). La Joy, the back seat passenger was also pulled from the car by Nissen. Nissen then returned to the car where he picked up a .357 magnum from the floor of the back seat (Abs. 30, 43). No other weapons were found, and neither Torello nor La Joy was armed (Abs. 43, 59).

Vana next saw his car about 10:30 (Abs. 22). On May 2, 1965, Vana did not know D'Argento, Torello nor Michael La Joy nor did he give them authority to drive or take custody of his car (Abs. 22).

As this Court can see, police officer Nissen, a member of the City of Northlake Police Department, was the most important State's witness. (See 4th and 14th paragraphs of Appellate Court decision, *infra.*)

While a transcript of the testimony of Officer Nissen before the grand jury was made available to the defense, it clearly appeared that there was another prior statement of his given to the State's Attorney's office, which statement was extant, and which was denied to the defense.

Officer Nissen testified clearly that he had given such a statement:

> "Q. Did you at any time, after you appeared before the Grand Jury, give any statement to a reporter sitting just—strike that—to someone just outside the Grand Jury room? Did you ever give a statement to anyone there, as to what you testified to?
> "A. Well, after I left the Grand Jury room I went into another room off the side.
> "Q. And gave a statement, did you not?
> "A. Yes, sir, I'm sorry.
> "Q. They took that down, they wrote that down, correct?
> "A. In the Grand Jury room.
> "Q. Right, what you said in the Grand Jury room?
> "A. Yes, sir.
> "Mr. Banks: May I see that, please? May we see a copy of that report?" (Abs. 33-34)

This was the extent of Officer Nissen's testimony, for at that moment, the prosecutor asked to be heard outside the presence of the jury, and objected to turning over the report on the confusing ground that apparently the statement wasn't long enough.

> "Mr. Lynch: Our objection is this, Judge, that the defense counsel, as I understand it, is asking for the production of the grand jury preparation sheet, which

is a sheet the State's Attorney's Office has made up, by their employee, after a person has testified before the grand jury. And in substance it is this; it is the most simple summary of what the case is, that could possibly ever be developed. Now, it is our understanding, under the Wolff case, it is our understanding as to the production of statements, that the cases require the production of statements which are in substantially the language of the particular person involved. Here we have a witness who was on the stand approximately a little less than an hour, about an hour, and I have on the preparation sheet eight typewritten lines. This is not substantially the language of the witness.

"The Court: Do I understand this to be when the witness leaves the grand jury, somebody from your office says 'give me a thumb-nail sketch of it'?

"Mr. Lynch: Yes.

"The Court: From your office, not an outside reporter?

"Mr. Lynch: From our office, the State's Attorney's Office.

"Mr. Barsy: Judge, it's a little bit more than that, because I started out in that department when I was an assistant state's attorney. It's a little more than that. When a person comes out of the grand jury, they have a secretary there, * * *

"Mr. Barsy: But that is their duty, to take a statement from the witnesses as to substantially what they testified to before the grand jury. So our contention would be, Judge, no matter, what kind of apologies he wants to make for the statements, whether they are good, bad or indifferent, our contention is that we are entitled to them." (Abs. 34-35).

Thereupon, the prosecutor tendered the statement to the judge for *in camera* inspection.

The Court then said he had read the statement and said he found "absolutely nothing inconsistent in his Grand Jury testimony or the so-called Prep statement . . . that could be used as a basis for impeachment." (Abs. 35-37). He then held that he would let the defense see the statement but would not let it be used for impeachment purposes. The defense refused to see it if it could not be used for its intended purpose, impeachment. The Court then sustained the State's objection to the production of the Prep sheet (Abs. 37-39).

From this record, the Appellate Court found "no error here. It is clear that this statement was a summarization of Nissen's grand jury testimony, not prepared by him and not in his language." This determination derives exclusively from representations by the prosecutor, who was not present at the taking of the statement. Neither the witness, nor the person who took the statement was heard from.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Appellate Court of Illinois, and the denial of the Supreme Court of Illinois of the Petition for Leave to Appeal on the following grounds:

1. The denial to a defendant charged with crime of the use for purposes of impeachment of an existing prior statement of the most important state witness concerning the subject matter of his testimony violates the due process provisions of the Fourteenth Amendment to the Constitution of the United States and conflicts with this Court's interpretation of due process as enunciated in *Jencks* v. *United States,* 353 U.S. 657 and *Campbell* v. *United States,* 365 U.S. 85.

2. Where a petitioner has, for the same single act, been charged with both a felony and a misdemeanor, and the Court vacates the misdemeanor conviction and allows the felony conviction to stand, he has been denied the equal protection of the law required by the Fourteenth Amendment to the Constitution of the United States and is contrary to the policy of lenity as expressed in *Ladner* v. *United States,* 358 U.S. 169; *Bell* v. *United States,* 349 U.S. 81, and *Gore* v. *United States,* 357 U.S. 386.

I.

This Court's affirmative definition of the requirement that prior statements of witnesses must be made available to the defense as an incident of due process (*Jencks* v. *United States,* 353 U.S. 657) was promptly adopted by the State of Illinois in *People* v. *Moses,* 11 Ill. 2d 84. This case

renounces that adoption. *Campbell* v. *United States,* 365 U.S. 85, in elaborating upon the effect of *Jencks* in a situation almost exactly like this, determined that not even the witness could evaluate such a statement as to whether or not it should be produced. It outlined the necessity of an adversary hearing to determine whether the statement was one to which the defense was entitled. It emphasized that that hearing should have a two-fold direction:

> "In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? In such case the report would be producible under subsection (e) (1) although not related to the paper Staula described. Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? If extrinsic evidence established this the report would be producible under subsection (e) (2). Palermo v. United States, 360 U.S. at pages 351-352, 79 S.Ct. at page 1224." *Campbell* v. *United States,* 365 U.S. 85, 94.

Such an adversary hearing is the least to which this defendant was entitled.

Our contention is that the trial court's deduction it was a summarization cannot be "clear", because it relies solely on the representations of the State's Attorney. It has been established by this Court that a statement required to be produced need not be prepared by the witness, *Campbell* v. *United States,* 354 U.S. 657, and we have nothing but the statement of the prosecutor that it was "not in his language."

The contention of the State that the denial of the use of the notes was valid because it foreclosed the defense from rummaging through government reports hunting for exculpatory scraps was rejected by this Court when it decided *Brady* v. *State of Maryland,* 373 U.S. 83 in 1963.

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d at 169." *Brady* v. *State of Maryland*, 373 U.S. 83, 87-88.

Further, the Trial Court's ruling that the statement could not be used for impeachment purposes exceeded his authority.

That determination is secured to the defense, and so the defense clearly advised the Court:

> "And, secondly, Judge, I will have to respectfully state to the court that the defendant LaJoy objects to the court making the determination, and looking at these statements, as to whether or not there was anything available within them for the use of defense attorneys.
>
> "I think that this is something that can only come into the province of the defense attorney's mind and would be something that he would have to determine himself rather than relying on the court's judgment.
>
> "So we, respectfully, object to the court's statement that he sees nothing there and, therefore, it can't be used. And we feel that it should be turned over to us; that this was our initial request for it to be turned over to us to make whatever use of it that we, as defense attorneys, feel it might have in regard to the cross examination of this witness." (Abs. 38)

That the determination was exclusively that of the defense was recognized long since by this Court.

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in

> his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." *Jencks* v. *United States,* 353 U.S. 657, 668-9.

In like manner, the Illinois Supreme Court has found it incumbent upon trial courts to determine, not only whether a statement existed (as here we know full well), but also whether the statement constituted such a statement as the defense was entitled to use in impeachment. *People* v. *Neiman,* 30 Ill. 2d 393; 197 N.E. 2d 8.

II.

It was the determination of the Illinois Appellate Court that conviction on the two Counts charged could not stand.

> "In our opinion, defendant's convictions for 'theft' and for 'Criminal trespass to vehicle' are based upon a single act, and only one sentence should have been imposed and that sentence should have been for the greater offense, in this case the offense of 'theft'."[2]

It is then exquisitely clear that the Congress of the State of Illinois has passed two statutes, obviously intended for application to two different sets of facts, but has not set forth with clarity what state of facts satisfies the one, and what the other. That leaves to the prosecution the election of whether an identical act constitutes a felony or a misdemeanor. It leaves to the prosecution the choosing which defendant will be the felon and which the misdemeanant. Thus, by prosecutorial application, this peti-

[2] Practically the partial reversal accomplished nothing except word service, the improper sentence on the misdemeanor being identical and concurrent with that imposed on the felony.

tioner, convicted of a felony was denied equal protection of the laws guaranteed under the Fourteenth Amendment. We do not believe it feasible that the Congress intended such a result, we believe the passage of two such statutes without a clear indication of what was intended by each was an inadvertence, an inadvertence not to be abused at prosecutorial discretion to the end that the prosecutor becomes the legislator.

We submit the established basic theory of American jurisprudence adopts the doctrine of lenity, and these charged crimes being based on a single act, the lesser, with a proper sentence, should be the one allowed to stand. *Ladner* v. *United States,* 358 U.S. 169, 177; *Gore* v. *United States,* 357 U.S. 386, and as the theory is stated in *Bell* v. *United States,* 349 U.S. 81:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U.S. at 83.

CONCLUSION

The Petitioner prays this Court's Writ of Certiorari be issued on all, or any one, of the grounds hereinabove set forth.

Respectfully submitted,

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APPENDIX

APPENDIX

52850

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

JOHN J. TORELLO,

Defendant-Appellant.

— Appeal From Circuit Court, Cook County. —

Honorable Charles Barrett, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT:

In a 2-count indictment, defendant, John J. Torello, Michael LaJoy and Joseph D'Argento were charged with "theft" and "criminal trespass to vehicle." On June 29, 1966, D'Argento pleaded guilty. In August 1967, a jury found Torello and LaJoy guilty of both charges. They were each sentenced to terms of two to five years on the theft count and two to five years on the trespass count. The instant appeal was perfected by Torello only.

On appeal, defendant Torello's contentions are: (1) Count I fails to charge a crime; (2) the record was deliberately permeated with evidence distinct and entirely unrelated to the charges brought to the intentional prejudice of the defense; (3) reversible error was committed in denying to defendant a prior statement of the State's principal witness; (4) the State failed to prove this defendant guilty beyond reasonable doubt; and (5) the court erred in its instructions to the jury and in failing to instruct as requested by the defense.

Count I of the indictment alleges that on May 2, 1965, the three defendants "committed the offense of theft, in that they, knowingly obtained unauthorized control over an automobile, of the value of more than one hundred fifty dollars, the property of Thomas Vana, intending to deprive said Thomas Vana permanently of the use and benefit of said property, in violation of Chapter 38, Section 16, (a) [*sic*], of the Illinois Revised Statutes 1963." Count II charged defendants with "the offense of criminal trespass to vehicle, in that they, knowingly and without authority entered a vehicle, to wit: an automobile, the property of Thomas Vana, and without the consent of said Thomas Vana, in violation of Chapter 38, Section 21-2, of the Illinois Revised Statutes 1963."

The testimony for the State shows that an automobile belonging to Thomas Vana was stolen on the evening of May 2, 1965. He made an auto theft report at about 9:45 P.M. Shortly thereafter, Police Officer Nissen, a member of the City of Northlake Police Department, observed a parked car with a man looking out the back window—"He had a cloth over his face. As I pulled up behind the car, the car proceeded to drive away from me. I was driving a marked squad car." He put the red light on. By police radio, he reported to the Northlake police station that he was following a car—"there were three subjects in the car and two of them masked." He continued pursuing the car at speeds which varied between 50 and 80 miles per hour. After an extended pursuit, participated in by the Melrose Park police, the car being pursued stopped against a curb, and Nissen fired four shots into the car. Nissen ran over to the side of the car and informed the parties they were under arrest. As he opened the door of the car, Torello fell from the driver's seat.

Vana testified that he did not know D'Argento, Torello nor LaJoy, nor did he give them authority to take custody of his car.

The only witness for the defense was D'Argento, who testified that he had stolen Vana's car without the knowledge of either Torello or LaJoy. He was carrying a gun in his belt and put the gun under the passenger's seat. Later he met Torello and LaJoy, and he asked Torello to drive because he wanted to discuss business with LaJoy. While they were parked on a side street a police car pulled up and flashed a light. D'Argento told Torello to take off and get going because it was a stolen car, and if he [D'Argento] was arrested, he would lose his appeal bond [for a federal offense] and would have to go to jail.

D'Argento further testified that while he was in the car, no one had hoods over their heads nor was there any cloth covering on anyone's face. No one threw anything out of the automobile during the chase. "At first Torello did not want to go, then I reached down and got my gun and told him it was a stolen car. I pulled it out like this and told him to get going. I had the gun in my hand." He had pleaded guilty "to this particular charge before Judge White" and received a sentence of ten years.

Defendant Torello was found guilty in two separate jury verdicts of theft and of criminal trespass to vehicle, and the court entered judgment on both verdicts.

Considered first is defendant's contention that Count I fails to charge a crime. Count I was the "theft" charge. After relating the essential elements of the crime of theft, Count I included "Chapter 38, Section 16, (a), of the Illinois Revised Statutes 1963." Before the commencement

of the trial, the court denied defendant's motion to dismiss the indictment because there was no section 16 (a) in the Criminal Code of Illinois. Leave was granted to the State to insert " 'dash 1', after the 16," so that after amendment the section alleged to be violated was designated as "Section 16-1 (a)" instead of "Section 16, (a)."

We find no merit in defendant's contention as to Count I. In this case the incomplete numerical designation of the section violated was a formal defect which could be corrected under the provisions of section 111-5 (Ch. 38), entitled "Formal Defects in a Charge." Defendant was not prejudiced by the section number amendment because Count I alleged all of the essential elements of the offense of theft, as stated in section 16-1 (a), and "so far particularize[d] the offense" so that defendant was apprised with reasonable certainty of the precise offense with which he was charged. See *People* v. *Gold,* 38 Ill.2d 510, 516, 232 N.E.2d 702 (1967); *People* v. *Hall,* 55 Ill. App.2d 255, 204 N.E.2d 473 (1964).

Considered next is defendant's contention that the only real issue in this case as to him was whether he had knowledge that the Ford was stolen—"That, and that alone, was all the jury was to decide. That issue was obscured to the point of obliteration by the State's misconduct in the introduction of the prejudicial evidence."

Prior to the trial the defense was given a list of physical evidence that the State intended to introduce. On the list were three pistols and two cloth masks. After a hearing about the propriety of the intended proof, the court ruled that "even though they may be evidence of another crime, if they are properly part of this case, then they are evidence in this case."

During the trial, frequent reference was made to the masks and guns by the officers who participated in the chase and subsequent investigation.

Officer Nissen testified that when he began the chase he noticed that the man in the back seat and the one on the passenger's side were masked; that an object was thrown from the passenger's side during the chase, and when he returned to the approximate vicinity three and one-half hours later, he found a snow mask. He further testified that when the Ford stopped after going out of control, the passenger in the front seat displayed a gun, which he dropped into the back seat, and that he [Nissen] found a .357 magnum in the back seat.

For the State, a nurse's aide testified that it was she who admitted defendant Torello to the 4th floor at Westlake Hospital for treatment for head and leg bullet wounds after the arrest. She said that when she undertook to examine and inventory defendant's clothing and valuables, she found a mask.

State's witness Police Sergeant James Diaferia testified that he went to the receiving room at the hospital and was given a mask by someone; also, at about 10:15 P.M. on May 2, he had a conversation with two unidentified women, and then went 30 or 40 feet south from the point of arrest and picked up a loaded gun, a .357 loaded magnum.

The People's exhibits, admitted into evidence over defendant's objection, included Exhibit 4, the mask which was found on the street by Officers McKenzie and Nissen; Exhibit 5, a .357 magnum identified by Officer Nissen as the pistol that was dropped into the back seat of the car by D'Argento; and Exhibit 7, the mask identified by the nurse's aide.

Defendant's authorities on this point include *People* v. *Donaldson,* 8 Ill.2d 510, 134 N.E.2d 776 (1956); *People* v. *Hexum,* 83 Ill. App.2d 192, 226 N.E.2d 877 (1967); and *People* v. *Doyle,* 76 Ill. App.2d 302, 222 N.E.2d 205 (1966). In *Donaldson,* it is said (p. 517):

> "Evidence which tends to show that an accused has committed crimes or acts of misconduct which are distinct and entirely unrelated to the one for which he is being tried is both incompetent and prejudicial."

As knowledge on the part of defendant Torello that he was driving a stolen car was an essential element here, we believe the testimony as to the guns and masks and their admission into evidence was proper. As argued by the State, this evidence was admissible as part of a direct narrative of the circumstances surrounding the arrest of Torello. See *People* v. *Alexander,* 69 Ill. App.2d 27, 216 N.E.2d 180 (1966). Also, we consider the evidence to be within the guidelines of *People* v. *Allen,* 17 Ill.2d 55, 63, 160 N.E.2d 818 (1959):

> "The test of admissibility of evidence is whether it fairly tends to prove the particular offense charged and any circumstances may be put in evidence which tend to make the proposition at issue either more or less probable."

We think a jury might have reasonably found from this evidence that Torello knew the car he was driving was stolen. We find no error here.

Considered next is defendant's contention that reversible error was committed in denying to defendant a typewritten summarization of Nissen's testimony before the Grand Jury, referred to as "a thumbnail sketch."

Defendant sought to examine this statement for impeachment purposes during Nissen's cross-examination. Out of the presence of the jury, the State tendered the statement to the trial judge for "*in camera*" inspection. The judge read the statement and stated to the attorneys that he found "absolutely nothing inconsistent in his Grand Jury testimony or the so-called Prep statement * * * that can possibly be used as a basis for impeachment." The judge ruled that he would let the defendant see the statement but would not let it be used for impeachment purposes. The defense refused to examine it, and the court sustained the State's objection to its production.

Defendant argues that the prosecution is required to furnish on demand to defendant, for impeachment purposes, specific statements in its possession made by State's witness, which have been established to exist and which are in the witness' words or substantially verbatim. Authorities include *People* v. *Neiman,* 30 Ill.2d 393, 197 N.E.2d 8 (1964).

The State argued that the statement was not substantially the language of Nissen, and the defense had been furnished the full transcript of Nissen's testimony before the Grand Jury for impeachment purposes, if any impeaching material was contained therein. The State noted that this was a preparation sheet in the nature of the work product of the office of the State's Attorney, and it would be unfair and improper to take these preparation sheets and compel a witness to stand for impeachment on them for some inconsistency which might exist between that witness at the trial and what had been verbally sketched out on the sheet by another person. We find no error here. It is clear that the statement was a summarization of Nissen's Grand Jury testimony, not

prepared by him and not in his language. See *People* v. *Neiman,* 30 Ill.2d 393, 397:

> "The law is well settled that the prosecution is required to furnish on demand to the defendant for impeachment purposes specific statements in its possession made by the State's witness, which have been established to exist and which are in the witnesses' own words or substantially verbatim."

Defendant next contends that he was not proved guilty beyond a reasonable doubt. Defendant argues that "mere presence at the scene of a crime is insufficient to establish guilt." (*People* v. *Boyd,* 17 Ill.2d 321, 327, 161 N.E.2d 311 (1959.) Flight, "standing alone * * * will not sustain the guilty finding"—"something must be brought in to sustain knowledge before flight takes on any significance." Defendant cites *Embree* v. *United States,* 320 F.2d 666, 668 (9th Cir., 1963), where it is said:

> "Perhaps Embree's flight tends, circumstantially, to prove that he was guilty of some crime. But since there is nothing in the record to indicate that he was informed, before his attempted flight, that he was being sought in connection with the offenses involved in this case, such flight does not constitute an admission, or other evidence, that he is guilty of those crimes."

We find no merit in this contention. The record clearly shows that defendant was the driver of a stolen car, and he was arrested after a long and speedy chase. Masks and guns were found either in the car or under circumstances which clearly connected them with defendant. The jury saw and heard the various witnesses who testified, and it was their function to determine the relative weight and credibility of the testimony of each of those witnesses. The jury chose not to believe D'Argento's testimony that

Torello did not know that the car was stolen, and that he forced Torello to drive the car in an effort to escape the arrest. There was ample evidence to support the verdict and to establish defendant's guilt beyond a reasonable doubt. In *People* v. *Novotny*, 41 Ill.2d 401, 244 N.E.2d 182 (1968), it is said (pp. 411-12):

> "We have recently stated: 'When the trier of facts renders a decision based upon credible and substantial evidence which is sufficient to convict, that verdict is not subject to question on review merely because the judge or jury chose to believe the consistent testimony presented by the State. * * *.' It is neither the duty nor the privilege of a reviewing court to substitute its judgment as to the weight of disputed evidence or the credibility of witnesses for that of the trier of fact who heard the evidence presented and observed the demeanor of the witnesses * * *; and we will not reverse a criminal conviction where the evidence is not so improbable as to raise a reasonable doubt of guilt."

Next considered is defendant's contention that the Circuit Court erred in instructing the jury and improperly refused defendant's instructions on want of knowledge and flight. The defendant states that his defense was a want of knowledge by him that he was in a stolen car, and an explanation of his flight which followed his reluctance to flee when an armed man told him to "get going."

We have examined all of the instructions given to the jury, which included a number of instructions offered by both defendants. An extended discussion on the refused instructions is unnecessary. We find the jury was adequately instructed on both counts—theft of an auto and criminal trespass to vehicle—and on all issues including defendant's knowledge that the car was a stolen vehicle and his flight. We find no error here.

Finally considered is a contention initially raised by defendant in his reply brief. Defendant states: "On careful review of the abstract in this case, it appears that the defendant Torello was convicted of the crime of criminal trespass to a vehicle on which he was sentenced to a period of two to five years. This fact escaped appellate counsel on the first reading. Criminal trespass to a vehicle is defined in Chapter 38, Section 21-2 and carries a sentence not to exceed one year in a non-penitentiary institution. The sentence imposed herein is, therefore, illegal."

The record shows that defendant's notice of appeal referred only to "theft, in violation of Chapter 38, Section 16 (a) of the Illinois Revised Statutes" [Count I]. Also, the record does not show any order or direction that the sentences for "theft" and "criminal trespass to vehicle" be served concurrently. The briefs and contentions of both sides are primarily centered on the "theft" conviction.

In view of the appeal record, it might be questioned whether this court may properly consider defendant's conviction and sentence for "criminal trespass to vehicle." However, we believe that Supreme Court Rule 615 is sufficient authority for this court to review the "criminal trespass to vehicle" conviction because substantial rights of the defendant are affected. In *People* v. *McKinstray*, 30 Ill.2d 611, 616, 198 N.E.2d 829 (1964), it is said:

> "The court may, as a matter of grace, in a case involving deprivation of life or liberty, taken notice of errors appearing on the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented."

See, also, *People* v. *Bradley,* 30 Ill.2d 597, 601, 198 N.E.2d 809 (1964).

In our opinion, defendant's convictions for "theft" and for "criminal trespass to vehicle" are based upon a single act, and only one sentence should have been imposed and that sentence should have been for the greater offense, in this case the offense of "theft." (*People* v. *Duszkewycz,* 27 Ill.2d 257, 261, 189 N.E.2d 299 (1963).) Therefore, the sentence imposed on the charge of "criminal trespass to vehicle" should be set aside.

For the reasons given, the judgment and sentence of the Circuit Court of Cook County upon Count I of the indictment charging "theft" is affirmed, and its judgment upon Count II charging "criminal trespass to vehicle" is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

ADESKO, P. J., and BURMAN, J., concur.